SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 318

CONSOLIDATED DISTRIBUTORS, INC.,

versus

CITY OF ATLANTA.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

Jurisdiction.

Jurisdiction of this Court is invoked under *Title 28, Section 344 (b) U. S. C., Section 235 Judicial Code.*

The petition to which this is attached states special reasons why it should be granted.

Specifications of Error.

1.

The Supreme Court of Georgia erred in deciding that the City of Atlanta, a subdivision of the State of Georgia, could add the excise tax paid the United States under a federal law, to the cost of liquor in assessing such liquor for taxation.

2.

The Supreme Court of Georgia erred in adjudging that the City of Atlanta, a subdivision of the State of Georgia, could add the amount of the uncollected excise tax on liquors, levied under a federal law by the United States, but held in bond and the tax uncollected, in assessing liquor for taxation.

Applicable Law.

First Assignment.

The first assignment of error above involves a situation where petitioner, in order to be authorized to sell its liquors, had paid the excise tax required by *Title 26, U. S. C., Internal Revenue Code, Chapter 26;* and where the City added the amount of such tax to the cost of the liquors as a value to which the tax rate of the city was applied.

The Supreme Court of Georgia, at page 857 of its opinion herein, relied on two cases decided by the Supreme Court of North Carolina. These decisions are not binding even if they fit the facts here. In the latest of these cases, which is more nearly in point, it was argued as stated in the opinion, that "the price paid to the distiller by the plaintiff (taxpayer) was $1.25 per gallon," and the court held that that purchase price was the sum to which the state tax was to be applied, although the distiller, before he had sold to the purchaser, "had paid the government tax of $1.10." The Court, answering the argument that the $1.25 included the tax of $1.10 paid by the distiller before the sale, said: "But the tax paid was the purchase price and it is immaterial to the purchaser * * * how much (was) for tax." There the seller paid the tax before the purchaser bought the liquors, here the purchaser paid the tax after the purchase; and the Supreme Court of Georgia, in headnote 2, page 853, in holding that the amount of the tax must be included in the assessed value, however paid, said:

> "Where * * * such taxes are paid by a wholesale dealer, either by his direct payment to the Government under arrangement with the manufacturer or by his payment to the manufacturer of an increased purchase-price, the amounts of these taxes constitute an element in the cost and value of the liquors so purchased by the dealer. Therefore a city may lawfully include these amounts in assessing the value of the liquors for ad valorem taxation; and such an inclusion is not a tax on Federal excise taxes."

The Georgia court, in its opinion herein, relied on *Lash's Products Co.* v. *U. S.*, 278 U. S. 175, 176 (49 Sup. Ct. 100, 73 L. Ed. 251); and other cases from lower federal courts and one state court (p. 857). These cases are inapplicable to the issue here. In the *Lash* case, the dealer added the tax to the selling price and the tax under the statute was 10 per centum of "the price for which so sold."

It is not here contended that the liquor could not be taxed "upon the value of said property," *(Ga. Code 92-4101)*, as other personal property. We do contend that the tax, whether advanced or to be advanced, could not be added to the inherent value of the property. If the tax had been based on an assessment at the inherent value of the liquor, it would have been legal. *Carstairs* v. *Cochran*, 193 U. S. 10, 16, 17.

"Cost of Production" was considered as a basis of a sale or pledge of liquor by warehouse certificate in a bonded warehouse in *Taney* v. *Penn. Nat'l Bank*, 232 U. S. 177, 185. In that case the limited right or title is stated (p. 185), and while that case is not definitely determinative of the issue here, it tends to support petitioner's contention. Indeed it can be said that the Supreme Court of Georgia "has decided a federal question of substance not theretofore determined by this court."

An important case not referred to by the lower court throws light upon this subject. In *Thompson* v. *Common-*

wealth of Kentucky, 209 U. S. 340, there was for consideration a statute of the State of Kentucky (sec. copied at page 345 of the opinion), which authorized taxes on distilled spirits while in a bonded warehouse. This statute, however, made the taxes due following the payment of the Government tax and the resulting right to remove. As the government tax had not been paid, it follows that the Kentucky tax was levied only on the value of the distilled spirits. It was contended there by the plaintiff in error that the state could not tax the property at all or at any value. The Kentucky court held that it was not the purpose of the state

> "to collect the taxes so long as the spirits are in the custody or under the lien of the Federal Government."

Because of this holding, which is directly in conflict with the holding of the Georgia Supreme Court in the instant case, this court affirmed the right to tax. Because of the reservations in the *Kentucky* case, we submit that it is authority against the holding of the state court in this case.

In *Hannis Distilling Company* v. *Baltimore,* 216 U. S. 285, at page 292, the case of *Thompson* v. *Kentucky,* above, was followed. The whole tenor of this second case, as of the first, was to show that the tax had not been included in the valuation. *In re Miller Distilling Company,* 176 Fed. 606, affirmed 232 U. S. 174, the person in the situation of the taxpayer here was held to be a bailee and not an owner.

In 21 *Op. Atty. Gen.* 73, the Attorney General ruled that the dispensary law of South Carolina was ineffective and inoperative as against distilled liquors held in the United States bonded warehouse. This opinion is but corroborative of our argument herein that the taxpayer here had until the tax was levied no right to possess the property and only an interest therein.

Second Assignment.

This assignment differs from the first. There the tax had been paid, here it had not.

If the first issue on which this petition is grounded shows error in the court below, error exists as to the second issue. The first issue might be held free from error, and error exists in the second. The first required adding to the value a tax already paid, the second required adding to value a tax that was to be paid, with deduction for losses, in eight years.

A dealer who buys liquors can not re-sell them until the tax is paid. His is a qualified interest in liquor and he should be taxed only on the value of that interest.

By an elaborate system of regulation, the United States receives large amounts in excise taxes as payment for permitting the manufacture and sale of liquors. If the amount charged for this permission, paid or unpaid, must be added to taxable value, the government's regulatory and taxation laws are affected. If a distiller buys liquor at $2.00 a gallon and is taxed for that amount plus a four dollar tax, and keeps his liquor in the bonded warehouse for eight years, he has paid on an ad valorem valuation of six dollars per year, or a total valuation of $48.00, $2.00 inherent value, and a tax of $4.00 which is repeated in the assessment for eight years. This actual value added for eight years, a total of $16.00, is added to the tax for this length of time, making a total on which tax was paid of $48.00. That this is a direct interference with federal regulation is apparent. So the Georgia court disregarded a valid federal law.

The ordinary tax payer does not add to the value of his property the tax, whether paid or due, eight years hence, so the judgment of the court below denies petitioner here the equal protection of the laws.

It may be contended that the opinion on rehearing denies

petitioner the right here and now to raise the second question. As shown in the petition, this issue was raised and a decision avoided thereon by the holding that the pleadings did not raise such an issue. It is conceded that had a special demurrer been urged and decided, an amendment to the petition could properly have been required. There was no special demurrer on the issue discussed in the supplemental opinion of the court below. The pleadings summarized in the petition show that there were both paid and unpaid taxes. These facts were before the trial court and the Supreme Court. Perhaps they could have been more elaborately stated, but no demurrer or motion for greater detail was filed to the allegation. In the first opinion the Supreme Court of Georgia made the decision applicable to "direct payment to the government" or "by payment to a manufacturer of an increased price." It is clear that the facts were before the Courts below.

Regardless of the pleadings, the Supreme Court of Georgia has sustained a judgment of the trial court which taxes petitioner at a value reached by adding the government tax paid or to be paid. The taxing statute of Atlanta, as administered by this judgment, is repugnant to laws of the United States and denies a right, privilege and immunity claimed under the Constitution and statutes in pursuance thereof. Petitioner falls within the rule stated in *Vidalia R. Co.* v. *State of Indiana,* 207 U. S. 319, 367, where it was held that this court "is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any federal question," and following this holding the court continued:

> "Newport Light Co. *v.* Newport 151 U. S. 527, 536, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429, and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is

avoided by giving an unreasonable construction to pleadings, * * *."

An untenable non-federal basis for a decision does not deprive this Court of jurisdiction. *Ward* v. *Levi Connely*, 253 U. S. 17; *Broadwell* v. *Carter County*, 253 U. S. 251.

"To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute, etc. R. Co.* v. *Indiana*, 194 U. S. 579.

In *Chicago R. Co.* v. *Illinois*, 200 U. S. 561, after stating the general rule, this court said:

"* * * this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

Respectfully submitted,

GEORGE C. SPENCE,
Counsel for Petitioner.

Citizens and Southern
National Bank Building,
Atlanta, Georgia.